

FILED

**IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS** NO. _____
CIVIL DEPARTMENT

2009 OCT -9 P 1:33

THREE KINGS HOLDINGS, L.L.C., et al.,)
 Plaintiff,)
))
vs.)
))
STEPHEN SIX, et al.,)
 Defendant.)
_____)

IN THE DISTRICT
IN THE JUDICIAL DISTRICT
IN SEDGWICK COUNTY, KANSAS
Case No. 09 CV 2450

JOURNAL ENTRY

Since the admission of Kansas into the Union in 1861, art. 15, § 3, of the Kansas Constitution has provided: Lotteries and the sale of lottery tickets are forever prohibited.” (State-owned lotteries are now permitted) A series of cases have defined what constitutes a lottery. See, *State ex rel. Six v. Kansas Lottery* 286 Kan. 557, 559, 186 P.3d 183 (2008). The term “lottery” includes all forms of gambling that involve the elements of consideration, chance, and prize. *State ex rel. Stephan v. Finney*, 254 Kan. 632, 634 (1994). In addition to the constitutional prohibition of lotteries, the “Kansas legislature has attempted to protect the people of this state from the insidious effect of gambling on the public morals.” *Games Management, Inc., v. Owens* 233 Kan. 444, 446, 662 P.2d 260 (1983). The State’s criminal statutes prohibit gambling including the placing of bets in games of chance. See, K.S.A. 21-4302. A “bet” specifically does not include “offers of purses...to actual contestants in any bona fide contest for the determination of skill...” K.S.A. 21-4302(a) (2).

In this action, plaintiffs seek a judicial determination, pursuant to K.S.A. 60-1701 *et seq.*, that the game of Kandu Challenge is predominantly a game of skill and therefore not illegal under the Kansas gambling statutes or the Kansas Constitution. Plaintiffs also seek an injunction pursuant to K.S.A. 60-901 *et seq.*, to prevent defendants from prosecuting plaintiffs for the

playing of Kandu Challenge, which plaintiffs contend is a legal game under Kansas law. In accordance with the Findings of Fact and Conclusions of Law set forth below, Plaintiff's Petition for declaratory judgment that Kandu Challenge is a legal game under Kansas law is denied.

Findings of Fact and Conclusions of Law

1. Plaintiff Three Kings Holdings, L.L.C., ("Three Kings") is a Kansas limited liability company with its principal place of business in Sedgwick County, Kansas. The owners and principals of Three Kings are Curtis Shawn Riley, Kurt R. McPhail, and Shane A. McCullough. These individuals invented the game of Kandu Challenge in 2008 and have applied for a patent for the game. The game is a modified version of Texas Hold'Em poker. The modifications are intended to reduce or remove chance while adding skill elements to the game and thereby make it a lawful game of skill. Three Kings sole source of income comes from licensing the Kandu Challenge game to Cobra Crew, L.L.C.

2. Plaintiff Cobra Crew, L.L.C., ("Cobra Crew") is a Kansas limited liability company which has done business as the Highlands Gastropub & Cardroom ("the Highlands") in Wichita, Kansas. The owner and principal of this company is Curtis Dean Riley. Kandu Challenge has been played at the Highlands through a licensing agreement between Three Kings and Cobra Crew.

3. Defendant Stephen Six is the Kansas Attorney General. Defendant Patrick Martin is the Chief Counsel of the Kansas Racing and Gaming Commission. Defendant Nola Foulston is the District Attorney for the Eighteenth Judicial District in Sedgwick County, Kansas. Defendant Gary Rebensdorf is the Director of Law and City Attorney for the City of Wichita, Kansas.

4. In a "cease and desist" letter dated June 22, 2009, defendants asserted the Highlands is "operating the commercial gambling enterprise 'Kandu Challenge' in violation of Kansas criminal law." Defendants threatened to prosecute plaintiffs under K.S.A. 21-4304 (a felony), K.S.A. 21-4305 (a misdemeanor), and a City of Wichita gambling ordinance if plaintiffs did not

stop "operating and advertising this illegal game immediately." Defendants also threatened administrative action against plaintiffs' licenses and business entities.

5. On June 26, 2009, plaintiffs ceased the playing of Kandu Challenge at the Highlands and brought this action as a result of defendants' threat of criminal charges.

6. On July 21-22, 2009, the Court heard testimony from sixteen witnesses and received exhibits from both sides in a hearing on plaintiffs' motion for a temporary injunction. This testimony was considered along with the testimony and evidence presented during the trial of this case on September 7-8, 2009.

7. The Kandu Challenge game is similar to Texas Hold'Em poker and the ultimate object of both games is to win money. As in Texas Hold'Em, Kandu Challenge players compete to form the best five-card poker hand. Kandu Challenge, however, differs from Texas Hold'Em in several relevant ways which are described below.

8. Kandu Challenge employs slightly different terminology than Texas Hold'Em poker. Instead of placing "bets," players place "challenges." Also, what is known as the "pot" in Texas Hold'Em poker is referred to as the "purse" in Kandu Challenge. At the Highlands, a player may play Kandu Challenge for 30 minutes without incurring any charges beyond what that player wagers in each hand. After the first 30 minutes, each player must pay Highlands a \$6 seat fee

every thirty minutes in order to continue playing Kandu Challenge. After the first 30 minutes, a player who has not paid his seat fee is not eligible to play the game and, thus, cannot win the prize purse. Highlands does not take a "rake" or cut of the purses.

9. The Kandu Challenge game generally proceeds as follows: The deck of cards is shuffled and then spread, face-up, for three to five seconds so that all players can see every card in the deck. If a card is not visible, any player has the option of objecting to the spread, which results in a re-spread of the deck. After the spread, the dealer picks up the cards, randomly cuts the deck, displays and announces the cut card. After learning the identity of the cut card but

before any cards are dealt, players may choose to pay a 50-cent ante, or entry fee, and play the game - or they may choose not to participate in the challenge. There are no blinds or forced participation in the game. In Texas Hold'Em, the players do not know the cut card, do not see a spread of the cards, and at least two players are forced to wager in every hand. (the little blind and big blind).

10. For those players who choose to participate in the game after the deck is cut, (at Highlands this included virtually all players at the table for each hand) the game proceeds just as in Texas Hold'Em poker. Each player is dealt two cards, face down (hole cards or pocket cards) followed by a round of betting. After the first round of betting, one card is burned, i.e., taken from the top of the deck and set aside, face down. Then three community cards are dealt face up for all players to use. This is called the "flop." Following the flop, another round of betting occurs. Thereafter another card is burned, and one more community card, called the "turn", is displayed face up. This is followed by another round of betting. After the betting concludes, another card is burned, and the final community card is displayed, called the "river." A final round of betting ensues and upon conclusion, the players who are still in the hand reveal their cards (showdown), and the player with the best five-card poker hand wins and collects the purse.

11. The lottery elements of consideration and prize are plainly present in the game of

Kandu Challenge. The table charges, entry fees and challenges all fall squarely within the definition of consideration. See K.S.A. 21-4302(c); *State v. Nelson*, 210 Kan. 439 (1972). The purse in Kandu Challenge satisfies the prize element of a lottery. See *Moore v. Bissing*, 178 Kan. 111 (1955). At issue in this trial is whether or not the chance element of a lottery is present in the game.

12. Kansas follows the "dominant factor" test in determining whether any particular game is predominantly a game of skill or predominantly a game of chance. *Games Management Inc., v. Owens, id.* The task is to determine which factor, skill or chance, is the dominating

element that determines the result of the game. The burden is on the plaintiffs in this action to show that skill predominates over chance in the game of Kandu Challenge. A preliminary starting point in analyzing whether plaintiff has met this burden is to understand the terms skill, chance, and predominate.

13. Skill is the “ability, coming from one’s knowledge, practice, aptitude, etc., to do something well; competent excellence in performance.” *The Random House Dictionary of the English Language* (1973). Expert witnesses for both parties have defined skill in the context of poker as the decisions a player makes that affect the outcome of the game. “Skill speaks to the ability, through the application of human physical or mental capacity, to actually cause a desired outcome of a game when the game is played.” *State of Alabama, ex rel. Tyson v. Ted’s Game Enterprises, et al.*, 893 So.2d 355, 375 (2003) (Declaratory judgment that chance predominated over skill with respect to video game machines in issue). Kandu Challenge has the same basic “skill” elements as Texas Hold’Em. Elements of skill in Texas Hold’Em poker include knowledge of the mathematical probabilities or odds in poker; decisions related to betting, how much and when to bet; when to check, call, raise or fold; bluffing; reading an opponent; and evaluating the dealer. Kandu Challenge introduces an additional skill – a memory component. The players know the cut card, have seen the spread and to the extent they recall cards or groups of card which come into play (or which will not be played), they can use that information to their advantage in making decisions during the game.

14. Chance is “the absence of any cause or series of causes of events as they actually happen that can be predicted, understood, or controlled; luck or fortune.” *The Random House Dictionary of the English Language* (1973). Chance has been defined as “Absence of explainable or controllable causation; accident; fortuity; hazard; result or issue of uncertain and unknown conditions or forces; risk; unexpected, unforeseen, or unintended consequence of an act. The opposite of intention, design, or contrivance.” *Black’s Law Dictionary* (5th ed. 1979). There are

several elements of chance in Kandu Challenge, starting with the selection of the cut card by the dealer. The dealer randomly cuts the deck and no player can accurately predict the cut card. The pocket cards are also the product of chance, as are the flop, the turn, and the river. All of these chance events have a significant impact on the game since they establish or change the relative value of the competing player's hands. A player's skill set cannot cause, direct, or alter the cards which come into play in a hand of Kandu Challenge. "No amount of skill can change a deuce into an ace." *Joker Club L.L.C. v. Hardin*, 183 N.C.App. 92, 99, 643 S.E.2d 626 (2007) (determining chance predominates over skill in poker). Kandu Challenge does give players the opportunity, through skill, to predict at least some of the cards which may come into play (or not come into play) during the game. That knowledge is part of the Kandu player's skill set and gives the player an advantage in responding to a chance event, but it does change the fact that the random distribution of cards are chance elements in the game.

15. To predominate means "to be the stronger or leading element; preponderate, prevail." *The Random House Dictionary of the English Language* (1973). "To exert controlling power or influence, to govern, prevail, rule." *Webster's Third New International Dictionary* (1971).

16. Success in Kandu Challenge, like Texas Hold'Em, is the result of a combination of chance and skill, and both components are significant factors in the outcome of the game.

Chance plays a role in every hand; skill plays a role in every hand. The elements of chance and skill are intertwined throughout the game. Unfortunately, there is no reliable, easy, or practical way to measure the level of skill versus the level of chance. The simulated games of poker and Kandu Challenge conducted or testified about by the experts in this case were useful to demonstrate generally the interplay of skill and chance but those simulations were otherwise not conclusive on the ultimate issue in this case.

17. The Court finds that Kandu Challenge players can improve their ability to remember particular cards or groupings of cards in the spread by practice and the use of various memory

strategies. A player who uses his or her knowledge of the spread has an advantage over players who ignore the spread. It appears relatively common that even new players, such as the law enforcement officers who played the game, can routinely remember five cards in the spread. Those players who develop their spread reading and recall abilities have an advantage over players who do not. That advantage is difficult to quantify and is variable because it is subject to the random cut of the deck. The value of the information about the cards which is gained from the spread is dependent in large part on those cards' relation to the cut, which is a chance event. Nonetheless, experienced Kandu Challenge players improved their play as a result of the spread. Reading the spread represents a skill which can be developed, and improved, by any player of Kandu Challenge. Based on the expert evidence regarding memory, the court finds it is not within the realm of possibility for a Kandu Challenge player to simultaneously know all of the cards in each player's hand, along with the flop, turn, and river cards.

18. Because of the similarity between Texas Hold'Em and Kandu Challenge, studies that attempt to analyze chance and skill in Texas Hold'Em are a useful starting point in analyzing Kandu Challenge. The most relevant study presented during trial was the "Statistical Analysis of Texas Hold'Em" (Exhibit 17) ("Cigital Study"). The Cigital study is evidence that the actual strength of the cards held by a player at showdown is not the determining factor in most hands of Texas Hold'Em. That study shows there is no showdown in 76% of the hands of Texas Hold'Em and ultimately the best poker hand wins only 12% of the time. This is because players fold or drop out of the game at various points as a result of their analysis of the odds of winning or losing the hand, reading other players playing style, bluffing, or some factor other than, or in addition to the strength of the cards they hold. As explained in the Executive Summary section of the study, "This study does not quantify the effect that luck has on Texas Hold'Em, but it provides compelling statistics about the way that the outcomes of games are largely determined by players' decisions rather than chance." Player's decisions represent the skill element of Texas

Hold'Em (and Kandu Challenge) while the cards in play represent the chance element. In Kandu Challenge, there is an element of chance which affects every skill decision made thereafter. For example, skill decisions are made by the players after they learn identity of the cut card, after the hole cards are dealt, and after each community card is displayed.

19. Experts for both sides agree that Texas Hold'Em is predominately a game of skill when analyzed over the long run and the evidence presented at trial supports this conclusion. With respect to Kandu Challenge, the addition of the spread and the display of the cut card increase the skill component above that available in Texas Hold'Em. Thus, the court finds that, like Texas Hold'Em, Kandu Challenge is predominantly a game of skill when analyzed over the long run. However, no one knows how many hands of poker or Kandu Challenge must be played before the "long run" is reached.

20. The defendants contend the court should not apply a long run analysis to the game of Kandu Challenge but should evaluate it in the context of a single hand. Plaintiffs, on the other hand, contend that a "single-hand" test is unrealistic because players simply don't ever play just a single hand, and further, that the single hand test would require pure skill to determine the outcome of every hand which is contrary to the dominant factor test. They argue that if skill predominates over chance in the long run, the skill must be more likely to predominate in any given hand. They contend the rules of the game should determine the issue, not the outcome of any one random time the game is played.

21. As defined by the rules of the game as presented during trial, Kandu Challenge is a game that is played one hand at a time. Under the rules, and as played at Highlands, the game of Kandu Challenge has a beginning and an end. It begins with the shuffle of the cards and ends when the purse is pushed to the winner. Neither the rules to Kandu Challenge nor the people who administer the game at Highlands require a player to play more than one hand of Kandu Challenge. There is no "long-run" in Kandu Challenge since playing multiple games is not part

of the rules. Because Kandu Challenge, by its very rules, is a single event, with a specific beginning and end, the proper context in which to evaluate the game is as a single game.

22. Some skill sets have limited or no application in the single game analysis, such as long term betting strategies and reading other players styles or "tells" on the basis of time spent playing multiple games against a player. A decision to fold in a single game ensures a player will not win any money or have the best hand at the end of the game. Folding is an important part of the long run skill set in Kandu Challenge but it has little value in the single game where the player's goal is to win money. Bluffing has a reduced utility in a single game, and there is a limited opportunity to gather useable information about other players or the dealer.

23. The winner of a single game of Kandu Challenge is determined by the best hand at the conclusion of the game and the cards are all ultimately the product of chance, not skill. In the single hand, betting is based largely on the strength of the hole cards which are determined entirely by chance. In other words, the distribution of cards will predominantly determine the outcome of a single game of Kandu Challenge. As a result, the Court finds that chance is the dominant factor in determining the result of any single game of Kandu Challenge.

24. All of the elements of a lottery under Kansas law – consideration, chance and prize - are met after the completion of each game of Kandu Challenge as defined by its rules. The Court

finds that Kandu Challenge is predominantly a game of chance and prohibited by Kansas law.

IT IS THEREFORE ORDERED that Plaintiffs' requested relief is DENIED in its entirety, and judgment is granted in favor of Defendants.



Honorable Timothy G. Lahey
District Judge